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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1930

No. 36

R. E. GRAHAM and E. E. FOSTER, Co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

VS.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE.

MICHAEL F. GALLAGHER,
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Counsel for Illinois Kaolin Company.

BARNARD & MILLER PRINT, CHICAGO

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Petitioners,

vs.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Illinois Kaolin Company, an Illinois corporation having a case pending involving the question presented in the above entitled cause, respectfully move that this Honorable Court grant leave to them, as *amici curiae*, to file the accompanying brief in this case. Counsel for both parties have consented to the filing of this brief.

MICHAEL F. GALLAGHER,
SAMUEL M. RINAKER,
Counsel for Illinois Kaolin Company.

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REX B. GOODELL, Former Collector of Internal Revenue of the United States of America in and for the Sixth Collection District, State of California,

Respondent.

BRIEF OF AMICI CURIAE.

STATEMENT OF THE CASE.

This is a suit to recover additional income taxes for the year 1917 which the petitioners were compelled to pay, and paid under protest, in 1924. The petitioners filed on March 22, 1918, their partnership income and excess profits tax return for the year 1917 and paid the tax due thereunder. In January, 1920, the Commissioner of Internal Revenue assessed an additional tax against petitioners for the year 1917. In February, 1920, petitioners filed a claim for abatement of the additional tax assessed, which claim was rejected by the Commissioner on December 27, 1922.

On March 22, 1923, the collection of the additional tax became barred by the statutory limitation applicable thereto. In November and December, 1924, the additional taxes were paid by petitioners under duress and under protest. On September 25, 1925, petitioners filed a claim for the refund of the money so paid on the ground that the additional tax was illegally collected because Section 250(d) of the Revenue Act of 1921 barred the collection of the tax after the expiration of five year from the date when return was filed. Petitioners' claim for refund was rejected by the Commissioner of Internal Revenue and on December 23, 1927, petitioners filed this suit in the United States District Court of California, in which court the case was tried upon a stipulation of facts and judgment was rendered in favor of petitioners on January 3, 1929.

Upon appeal the judgment was reversed by the Circuit Court of Appeals (9th Circuit) on the ground that petitioners' action for the recovery of the additional tax paid by them was barred by Section 611 of the Revenue Act of 1928 which provides that: payment of any additional internal revenue tax before the enactment of said Act should not be considered an overpayment under the provisions of Section 607 (relating to payment made after expiration of limitation on assessment and collection) of said Act, if, (1) such tax was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924; (2) a claim in abatement was filed; and (3) collection was stayed. The opinion of the court appears in 35 Fed. (2d) 586.

The Questions Presented.

The question before this Honorable Court is (1) whether Section 611 of the Revenue Act of 1928 should be construed to take away from the petitioners their right of action to recover an additional income tax paid by them under duress and under protest after the collection thereof had become barred by the limitation upon the collection thereof imposed by the Revenue Act of 1921; and (2) whether, if so construed, Section 611 of the Revenue Act of 1928, is in violation of the Fifth Amendment to the Constitution.

Contentions of Amici Curiae.

The Circuit Court of Appeals erred in reversing the judgment of the District Court in favor of the petitioners and in holding that the additional income tax for the year 1917, which petitioners paid under duress in 1924, was not illegally collected and recoverable. The decision of the Circuit Court of Appeals was erroneous because:

I. The additional income tax assessed against petitioners upon their income for the year 1917 was paid under protest in 1924 after expiration of the period within which its collection was authorized by the Revenue Act of 1921, and it is recoverable in an action at law.

II. Section 611 of the Revenue Act of 1928 is no bar to recovery in this suit (a) because this suit is not a claim under Section 607 of that Act but a suit commenced prior to its enactment, and (b) because neither Sections 611 nor 607 apply to suits at law.

III. Section 611 of the Revenue Act of 1928 by its terms is applicable only where collection of the tax "was stayed." It has no application where, as in this case, collection was merely delayed.

IV. Sections 611 and 607 of the Revenue Act of 1928 should not be construed to apply retroactively to claims for refund or suits filed prior to their enactment.

V. The tax liability, if any, of the petitioners was extinguished by the expiration of the period within which collection of the tax was authorized by the Revenue Act of 1921. Section 611 of the Revenue Act of 1928, if construed to revive that liability, violates the Fifth Amendment to the Constitution.

ARGUMENT.

I.

The additional income tax assessed against petitioners upon their income for the year 1917 was paid under duress and under protest in 1924, after expiration of the period within which its collection was authorized by the Revenue Act of 1921, and it is recoverable in an action at law.

The additional tax here involved was assessed in 1920 upon the income of the petitioners for the year 1917 and was paid under duress and under protest in November and December, 1924. The petitioners' income tax return for the year 1917 was filed on March 22, 1918, and on March 22, 1923, the collection of any tax upon income for the year 1917 became barred by the five-year limitation provisions of the Revenue Act of 1921. 42 Stat. 265. Section 250(d) of the Revenue Act of 1921, so far as applicable here, reads as follows:

> "The amount of income excess-profits or war profits taxes due under * * * prior income, excess-profits or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess-profits or war profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

With respect to the limitation provisions of the Revenue Acts of 1918 and 1921, this court said in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 350:

> "* * * Prior to the Revenue Act of 1918 there was no limitation against suit to collect income taxes. Section 250 (d) of the Act (40 Stat. 1083) required assessment within five years after return, and prohibited the commencement of suit or proceeding to collect such taxes after that period. This bar was held to apply only in respect of taxes for 1918 and later years. Then Sec. 250 (d) of the Act of 1921 made the limitation apply against collection of taxes under all the earlier Acts; and, in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors, prescribed the five-year period Act but allowed only four years as to those for 1921 and succeeding years. * * *"

In *Russell* v. *United States*, 278 U. S. 181, this court held that the period of limitation upon collection fixed by the 1921 Act was not extended by the Revenue Act of 1924 where assessment was made, as in this case, prior to the enactment of the 1924 Act.

We believe that it will be conceded that on December 23, 1927, when petitioners filed this suit they were clearly entitled to recover the additional tax so paid by them after its collection was barred by statutory limitation. Rev. Stats., Secs. 3220 and 3226; *Bowers* v. *New York & Albany Lighterage Co*, 273 U. S. 346; *Bowers* v. *Seaman*, 273 U. S. 346; *Seaman* v. *Bowers*, 297 Fed. 371; *Graham* v. *Du Pont*, 262 U. S. 234, 258.

II.

Section 611 of the Revenue Act of 1928 is no bar to recovery in this suit (a) because this suit is not a claim under Section 607 of that act but a suit commenced prior to its enactment, and (b) because neither Sections 611 nor 607 apply to suits at law.

Section 611 of the Revenue Act of 1928 and Section 607 of the Act, to which Section 611 refers, read as follows:

> "Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an over-payment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."
>
> "Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

(a) Section 611, it will be observed, merely provides that a payment of taxes under the circumstances specified in that section "shall not be considered as an overpayment under the provisions of Section 607." This suit was commenced in 1927 before Section 607 was enacted and, of course, was not based thereon. Neither Section 611 nor Section 607 prohibit a suit to recover taxes paid under

compulsion after their collection had become barred by the Statute of Limitations. The right to recover by suit taxes so paid existed prior to the commencement of this suit by reason of Revised Statutes, Sections 3220 and 3226 as applied in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346.

There is in Section 607 no express repeal of the statutes authorizing a suit at law to recover a judgment for the amount of taxes collected after they had become barred by the Statute of Limitations, there is no conflict between the former and the latter, and there is no language in Section 607 rebutting the presumption against any implied repeal of those statutes. *Red Rock* v. *Henry*, 106 U. S. 596; *United States* v. *Healey*, 160 U. S. 136, 146; *Washington* v. *Miller*, 235 U. S. 422, 428.

(b) Section 611, which merely limits the rights conferred by Section 607, has no application here. Section 607 provides: that the payment of a tax after expiration of the period of limitation for the collection thereof shall be considered as an overpayment (which statement, if it were applicable to actions at law, would be merely declaratory of the law theretofore in effect); and "shall be *credited* or *refunded* to the taxpayer if *claim* therefor is filed within the period of limitation for filing such claim." These are not appropriate words of reference to a suit at law and cannot properly be so regarded when used, as here, in a section where no reference is made to suits at law. A "claim" is not a suit. A "credit" or "refund" does not aptly describe a judgment. These words are appropriate to direct the Commissioner of Internal Revenue as to his duty in the matter of claims and refunds and should be so construed. They have no application to the present suit instituted prior to the enactment of the Revenue Act of 1928, nor do they apply to any proceeding not based upon the said Section 607 of that Act.

The view that Sections 611 and 607 are administrative provisions, having no reference to suits to recover taxes illegally collected, but, designed to control the action of the Commissioner of Internal Revenue and his agents is supported by the opinion of the Circuit Court of Appeals of the Third Circuit in *Heiser* v. *Erie Coal and Coke Co.*, 42 Fed. (2d) 214. That opinion, without discussion of the matter, states that the court agrees with the District Court's interpretation of these sections in *Clinton* v. *Heiser*, 30 Fed. (2d) 542 (W. Dist. Pa.). In a later opinion which covers this point more fully, *Diamond Alkali Co.* v. *Heiser*, 39 Fed. (2d) 643, 644, the same District Court said:

> "* * * As stated in our opinion in that case (*Clinton* v. *Heiser*, 30 Fed. (2d) 542), section 611 (26 U. S. C. A. Sec. 2611) was designed to control the Commissioner in crediting or refunding tax erroneously paid or collected. Section 3220 Rev. St., gave the Commissioner certain powers in respect to such credit or refund. These powers were curtailed by sections 1111, 1106, and 284 of the Revenue Act of 1926 (26 U. S. C. A. Secs. 149, 149 note, 1065), by which the Commissioner's authority to voluntarily refund taxes paid was confined to overpayments. Where the demand for refund was based upon the lapse of the statutory period of limitation, the Commissioner was denied the power of refunding or crediting the tax paid and the remedy was by suit. Section 607 (26 U. S. C. A. Sec. 2607) conferred power upon the Commissioner to refund or credit such payments, the power being modified, however, by section 611. It was necessary to give effect to section 607, to repeal section 1106(a) of the Act of 1926, which prohibited the Commissioner from making a refund unless there had been an overpayment. In short, sections 607, 611, and 612 of the Act of 1928, and section 1106(a) of the Act of 1926, *are administrative provisions* and do not destroy any right of action against the collector in the taxpayer; and the taxpayer undoubtedly had a right of action upon collection of the assessed tax being made in the face of the statute then in force, section

1106(a) of the Act of 1926, which declared that the bar of the Statute of Limitations shall not only bar the remedy but shall extinguish the liability."

Certain of the Federal Court decisions dealing with Section 1106 of the Revenue Act of 1926 also support the view that the use in a section of the Revenue Act of such administrative terms as "claims," "credits," and "refunds" to describe the proceedings and relief contemplated indicates that suits at law are not contemplated. *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407 (E. Dist. Va.); *Gove* v. *Nichols,* 23 Fed. (2d) 856 (Dist. Mass.); *Ellay Co.* v. *Bowers,* 25 Fed. (2d) 637 (C. C. A. 2d Cir.) (Certiorari denied 277 U. S. 606).

III.

Section 611 of the Revenue Act of 1928 by its terms is applicable only where collection of the tax "was stayed." It has no application where, as in this case, collection was merely delayed.

One of the three essential facts which Section 611 of the Revenue Act of 1928 specifies must exist in order that a payment made after the expiration of the Statutes of Limitation "shall not be considered an over-payment under the provisions of Section 607" of that Act is that collection of the tax in question "was stayed."

In the instant case the Circuit Court of Appeals held that the word "stay" as used in Section 611 does not mean a legal restraint, but means merely a voluntary delay such as occurred in this case.

In sharp conflict with the opinion in the case at bar is the opinion of the Circuit Court of Appeals of the Fifth Circuit in the case of *United States* v. *Burden, Smith & Co.,* 33 Fed. (2d) 229. Both opinions deal chiefly with the

word "stayed" in Section 611. In *United States* v. *Burden, Smith & Co.*, the Court rested its decision in favor of the taxpayer on the ground that mere delay in collection of the tax did not constitute a stay of collection within the meaning of Section 611. Other reported decisions in favor of the taxpayer resting in whole or in part upon this ground are *Cutcheon* v. *Rafferty*, 34 Fed. (2d) 708 (E. Dist. N. Y.); *Pepsin Syrup Co.* v. *Schwaner*, 35 Fed. (2d) 197 (So. Dist. Ill.); *Sugarland Industries* v. *Bass*, 36 Fed. (2d) 375 (W. Dist. Tex.); *Taubel* v. *Sturgess* (U. S. Dist. Co. N. J.) Decided November 8, 1930; Reported C. C. H. Fed. Tax Service 1930, Vol. III, p. 9187, paragraph 9657). In *Pigott* v. *Poe*, 41 Fed. (2d) 273 (W. Dist. Wash. N. D.) the Court decided against the taxpayer holding, however, that in that case there had been a stay of collection in the legal sense.

The word "stay" is defined in Anderson's "Dictionary of Law" as follows:

> "To interrupt, arrest, suspend. Used also as a noun: as, stay of judgment, sentence, execution, or other proceeding. See STET; SUPERSEDEAS.
>
> "May result from an agreement, an order of court, or the operation of law—as, when an appeal, a writ of error, or a *certiorari* is perfected by bail being furnished and the requirements of the law in other respects observed. See ERROR, 2, (3), Writ of."

1. In support of its conclusion that "stayed" in Section 611 means "delayed," the Court said that no provision of law could be pointed out which would operate as a stay where no bond was filed with the claim in abatement, and Section 611 refers to a stay where a claim in abatement was filed, with or without bond.

The only provision in any of the Revenue Acts prior to June 2, 1924, for filing a bond with a claim in abatement is contained in the Revenue Act of 1918, Section 214 (a), par. (12), and Section 234 (a), par. (14). By those sections

it was provided that where the taxpayer had sustained in the year 1918 a substantial loss from reduction of inventory value he might file with his return for that taxable year a claim in abatement of the tax on the ground of such loss, and that:

> "In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest."

When Section 611 refers, as it does, to the filing of a claim in abatement with bond, it must be taken to refer to the only situation where the Revenue Acts prior to June 2, 1924, provide for filing a bond with a claim in abatement—the situation under the provisions of the 1918 Act just mentioned. In such a case collection of the tax "was stayed" in the legal sense of compulsory restraint. It is unreasonable to suppose that "stayed" as used in Section 611 was intended to mean "stayed" in the legal sense in one case and merely "delayed" in other cases.

Apart from the particular claim in abatement provided for in the sections of the 1918 Act mentioned above, claims in abatement have been filed, under a long standing practice of the Treasury Department, by taxpayers for the abatement of taxes believed to have been erroneously assessed, the general authority for such claims in abatement being Section 3220 of the Revised Statutes. The filing of such claims in abatement whether with or without bond, did not, in the absence of some special agreement with the collector, operate as any stay upon collection of the tax. The practice of the Treasury Department and its understanding as to the effect of such claims in abatement is shown by the following regulation which it promulgated as an integral

part of the regulations under which claims in abatement were filed:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax, or make it any less the duty of the Collector to exercise due diligence to prevent collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund." (Regulations 33, Art. 261; Reg. 45, Art. 1032; Reg. 62, Art. 1032.)

In emphasizing the absence of any statutory provision which would operate as a stay without a bond, the Court apparently overlooked the fact that a stay in the legal sense may result from agreement. Such a stay is shown in the case of *Pigott* v. *Poe,* 41 Fed. (2d) 273, 274, a case involving Section 611, where certain taxpayers to avoid the collection of an additional tax upon their income for the year 1917 entered into an agreement in the year 1923 with the Collector "that, in consideration of distraint and collection stayed, they would deposit security for payment of any taxes adjudged due." Such agreement, the Court held, "legally as well as morally" restrained the Collector from collecting the tax. In that case a claim in abatement was filed but it does not appear that any bond was filed with such claim and, although securities were deposited pursuant to the agreement between the taxpayers and the collector, it was the agreement that restrained collection of the tax.

In the case of *Taubel Inc.* v. *Sturgess,* decided by the United States District Court, District of New Jersey (Opinion filed November 8, 1930; reported C. C. H. Fed. Tax Service, 1930, Vol. 3, page 9187, par. 9657), that Court said in construing Section 611:

> "Having arrived then at the conclusion that 'stay' and 'delay' are not synonymous, and that the stay mentioned in the section does not refer to a judicial

stay and finding no law under which a statutory stay would become operative, we must look further.

"The Revenue Act vests the Commissioner of Internal Revenue with power to establish rules and regulations for the enforcement of the act, pursuant to which the Commissioner may have established rules where claims in abatement are filed, but no pertinent rule or regulation has been brought to my attention. It has been suggested that a stay may also have arisen under an agreement between the collector and the taxpayer suspending the operation of the limitation by staying the collector. A reasonable view to take concerning the meaning of the word 'stay' is: that it connotes a state of facts either under rules and regulations or under stipulations made pursuant thereto which would in effect restrain the collector from making collection pending the decision of a claim."

It is reasonable to suppose that in Section 611 Congress intended to provide that, where a taxpayer tied the hands of the Collector by a stay in the legal sense either by filing a bond, when it would have that effect as it would have only in one instance—under Sections 214 and 234 of the Revenue Act of 1918, or by an agreement to that effect, then a payment by that taxpayer after the expiration of the Statute of Limitation should not be considered an overpayment under Section 607; and that Congress intended to provide, on the other hand, where the collector's hands were not so tied, as they unquestionably were not by the mere filing of a claim in abatement, and where he merely delayed or neglected to collect the tax, that payment after the statute had run should be considered overpayment under Section 607. That reasonable distinction is, we submit, clearly made by the language of Section 611.

To construe "stayed" to mean "delayed" would result in unreasonable discrimination against taxpayers who filed claims in abatement. If collection was merely delayed and the collector was not restrained from collecting the tax, then the collector was just as free to proceed against tax-

payers who had filed claims in abatement as he was to proceed against taxpayers who had not filed such claims. Under a construction of "stayed" in Section 611 as meaning "delayed," therefore, the taxpayer who filed a claim in abatement would be penalized for the collector's voluntary delay and the taxpayer who had filed no claim in abatement would not be so penalized although the same voluntary delay existed in both cases. The unreasonableness of such a result should lead the court to avoid if possible a construction of the word "stayed" in Section 611 as meaning "delayed."

2. In support of its conclusion that "stayed" in Section 611 is not used in its legal sense but in a popular sense as a synonym of "delayed," the learned Circuit Court of Appeals quotes in its opinion general dictionary definitions of the word. We respectfully submit that these definitions as quoted lend weak support to the court's position. "Stayed" is used transitively in Section 611. Webster's Dictionary as quoted shows the specific transitive meaning of stay to be: "to stop, or more usually suspend, the progress of by judicial proceedings or executive mandate." And in the first definition quoted in the opinion from the Standard Dictionary is the following: "To stop the progress of; check; hold back; *not now usually* of *physical motion; as to stay the ravages of a pestilence or pangs of hunger.*" These definitions do not show a current, ordinary popular use of "stay" as a synonym of "delay," but tend to show that it is not so used.

In poetical, dramatic and Biblical writings "stayed" is frequently used transitively. Its use in such manner in other writings cannot be called incorrect, but we believe it is a matter of common observation and experience that "stayed" is now generally used popularly only in its intransitive sense, *e. g.*, stay at a place. Simple illustrations

will suffice to show that "stayed" and "delayed" are not synonymous in ordinary popular usage. To hear in conversation that an accident had "stayed" the arrival of a train would sound quaint and unfamiliar to anyone today. One would expect to hear, in that situation, and one would hear, that an accident had *delayed* the arrival of the train. To many people the first statement would not be intelligible; the second would be clear to everyone. Where a customer of a business had been slow in paying his account, we cannot imagine the ordinary business man saying that "payment of the account had been stayed" when he meant merely *delayed*. The learned Circuit Court of Appeals, in an effort to avoid giving to the word "stayed" its normal current meaning as a legal term, has given to it a meaning which is certainly not based upon the ordinary current popular usage, in the light of which, by the general rule, non-technical words in a statute are to be construed. A consideration of the words "stay" and "delay" in the light of current popular usage leads inescapably to the conclusion that, if Congress had meant "delayed" in the clause "if collection of any part thereof was stayed," it would have used the word "delayed."

3. "Stayed," as a transitive verb, is obviously a familiar legal term connoting a legal restraint; and it should be so construed in Section 611 in accordance with the rules of statutory construction repeatedly announced by this court. As this court said in *United States* v. *Fidelity Trust Co.*, 222 U. S. 158, 160, speaking there of a legal expression of more limited use in the law: "When it (the statute) speaks of interests absolutely vested in possession, we presume it uses familiar legal expressions in their familiar legal sense." Also in *United States* v. *Patterson*, 150 U. S. 65, 69, where the question involved the word "hearing" in a statute fixing the compensation of a Commissioner

"for hearing and deciding criminal charges," this court said:

> "* * * His compensation is limited to the specific services for which Congress has provided compensation, and *words and phrases of accepted meaning in legal phraseology must not, because they may be popularly used in a broader sense, be given, when found in a statute, that popular significance so as to enlarge the matters in respect to which compensation has been authorized and may be awarded.* * * *" (Italics ours.)

That is exactly what the court has done in the instant case—construed an accepted legal term in a broad and alleged popular sense so as to enlarge the matters in respect to which the section applies.

If "stayed" is construed as a legal expression the meaning is clear without inserting "legal" before the word which the lower court in its opinion said it was not empowered to do.

4. It is a familiar rule of construction of statutes that where the meaning of a word is clear in one section of a statute, the same word will be construed as having the same meaning in other parts of the statute, unless a contrary intent appears. And the rule applies to the use of the same word in other statutes relating to the same subject matter. *Pampanga Mills* v. *Trinidad*, 279 U. S. 211, 218; *United States* v. *Hill*, 123 U. S. 681, 685.

Applying this rule to the use of the word "stayed" in Section 611 of the Revenue Act of 1928, it appears that that word is used in three other places in that same Act—Section 273 (f) (g) (h), and with reference in each instance, as in Section 611, to a *stay* of collection of a tax. It is plain from the provisions of these subdivisions of Section 273 which are set forth in the Appendix to this brief that the word "stay" as there used is not a mere

voluntary *delay* of the collector but a legal restraint upon collection of the tax by him. In the other revenue Acts there are provisions in which the word "stayed" is used where it is equally obvious that the word is used in its familiar sense of a binding restraint upon action. Revenue Act of 1926, Sec. 279 (f) (g) (h), Sec. 283 (i), Sec. 1001 (c). Revenue Act of 1924, Sec. 279 (a).

We have found no instance in any of the Revenue Acts where "stay" is used with the meaning "voluntary delay" which the court in this case has given to the word in construing Section 611.

5. In support of its conclusion that the word "stayed" in Section 611 means "delayed," the learned Circuit Court of Appeals points to the title of Section 611: "Collections Stayed by Claims in Abatement." Since filing a claim in abatement did not stay collection of the tax, it is argued that "stayed" as used in the title must mean "delayed." It is equally true that filing a claim in abatement since it did not stay collection of the tax would not necessarily delay collection.

The brief titles of sections of an Act serve generally as a means of convenient reference, as a suggestion of what the section contains rather than as an accurate description of its contents.

As this court said in *Hadden* v. *The Collector*, 5 Wall. 107, 108:

> "At the present day, the title constitutes a part of the Act, but it is still considered only a formal part; it cannot be used to extend or restrain any positive provisions contained in the body of the Act. It is only when the meaning of these is doubtful that resort may be had to the title and then it is of little weight. It is seldom the subject of special consideration by the Legislature."

While in doubtful cases the title of a statute or of a section of a statute may be examined for a clue to the probable legislative intent, that is not this case. "Stayed" is a familiar legal term used in its familiar legal meaning in other sections of the same Act. Its use as a legal term in the body of Section 611 is free from any ambiguity. The title of the section can not properly be used to create an ambiguity where none otherwise exists. Nor is it proper to use the title of the section to resolve an ambiguity artificially created by reading into "stayed" in the body of the section a meaning which is not its legal significance and which, as we have pointed out above, is at variance with the ordinary popular use of the word. The title of Section 611 should not be used to extend its provisions to cases not plainly within its terms.

6. Also, in support of its view that "stayed" means "delayed," the lower court relies upon a Report of the Ways and Means Committee of the House of Representatives made at the introduction of the bill which with various modifications ultimately became the Revenue Act of 1928. The part of that report relied upon by the court is set out in its opinion in the case of *Huntley* v. *Gile*, 32 Fed. (2d) 857, 859. That report shows perhaps the intention at that time of that important Committee of one of the branches of Congress, but the language of that report must yield to the final expression of the intent of Congress in the language actually used in the Act. Section 611, in so far as the word "stayed" is concerned, is on its face free from doubt or ambiguity. As this court, speaking of Congressional Committee Reports and Debates, said in *Wisconsin R. R. Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 589:

> "Such aids are only admissible to solve doubt, not to create it."

Also in *Standard Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356, this court said:

> "Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation but the words of the Act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports."

In applying the foregoing rules to Section 611 of the Revenue Act of 1928 the Circuit Court of Appeals (5th Circuit) in *United States* v. *Burden-Smith & Co.*, 33 Fed. (2d) 229, 230, properly said:

> "In support of this contention (that 'stayed' in Section 611 is used as synonym for 'delayed') reliance is had on the Report of the House Ways and Means Committee No. 2 of the 70th Congress, First Session, presenting the Bill. It is unnecessary to quote the language of the Report. Report of Committees of the House and Senate may be looked to as aids in construing ambiguous or conflicting terms of the statute but they cannot be taken as giving it a meaning not fairly within its words. *St. L. Iron Mountain & S. R. Co.* v. *Craft*, 237 U. S. 648."

While we believe it is clear that "stayed" as used in Section 611 of the Revenue Act of 1928 is used in its ordinary legal sense, if there were any doubt about the matter, the court should apply the rule laid down in *United States* v. *Merriam*, 263 U. S. 179, 187, 188, where this court said:

> "In statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

IV.

Sections 611 and 607 of the Revenue Act of 1928 should not be construed to apply retroactively to claims for refund or suits filed prior to their enactment.

From the opinion in the instant case (35 Fed. (2d) 587) it does not appear that the Circuit Court of Appeals considered at all the question whether Section 611 should be applied retroactively nor is the question considered in the earlier opinion of the same court in *Huntley* v. *Gile*, 32 Fed. (2d) 857, also dealing with Section 611.

The Circuit Court of Appeals of the Third Circuit in *Heiner* v. *Erie Coal & Coke Co.*, 42 Fed. (2d) 214, held that Section 611 did not prevent recovering a tax illegally collected after the Statute of Limitations upon collection had run and in the opinion said that it agreed with the District Court's interpretation of that section in *Clinton* v. *Heiner*, 30 Fed. (2d) 542 (W. Dist. Pa.). In the latter case the court said (Opinion, p. 545):

> "That section (Section 611) is not a specific retroactive ratification of the illegal collection by the defendant as its agent (as were the statutes under consideration in *United States* v. *Heinzen*, 206 U. S. 370, and *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226) but a statute designed to control the Commissioner and his agent."

And in *Bessemer Coal & Coke Co.* v. *Heiner*, 39 Fed. (2d) 492, the same District Court said of Section 611:

> "There are no words in the Act which can clearly be construed as a ratification of a tax which was barred by the Statute of Limitations at the time it was paid."

Section 611 provides that if a tax was assessed prior to June 2, 1924, and if a claim in abatement was filed "and if the collection of any part thereof was stayed, then the

payment of such part (made before or within one year after the enactment of this Act) *shall not be considered* as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." The words emphasized are manifestly words of prospective significance and that they are to be so construed is doubly clear when the words of the incorporated Section 607 are also considered. Section 607 provides that any tax "assessed or paid (whether before or after the enactment of this Act) after expiration of the period of limitation properly applicable thereto *shall be considered* an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor *is* filed within the period of limitation for filing such claim."

It seems plain that what Congress intended to say and did say in the language which we have emphasized is that in the consideration of any claims for refund filed after the enactment of these sections the Commissioner should be governed by their provisions. It is immaterial that the payments in question may have been made prior to the enactment of this Act. What the section deals with is the consideration to be given to claims which might be filed and the disposition to be made of such claims. In dealing with this subject matter the words used are of future import. The words "if claim therefor is filed," particularly when taken with the other words, should be given a prospective effect. It is common usage to employ the verb in the present tense when speaking of the future.

There are are many sections of the Revenue Act of 1928 in which "is" is used in the same manner as in Section 607 and where it is clear from the subject matter of those sections that "is" must refer to some act in the future. For example in Section 56 (b) referring to taxes to be

paid under this Act are the words: "If any installment *is* not paid on or before the date fixed for its payment, etc." Sec. 56 (h) reads: "Every collector to whom any payment of any income tax *is* made, shall, etc.," the verb has a future significance.

In Section 507 of the Revenue Act of 1928 Congress used the following language:

> "Unless claim for credit or refund, or the petition, *was filed* within the time prescribed.". (Emphasis ours.)

And Section 702 of the same Act provides:

> "Unless claim for refund or credit * * * *has been* filed by the estate before the expiration of the period of limitation for filing claims." (Emphasis ours.)

These sections tend to show that where Congress in the Act in question intended to refer to claims filed in the past it used the past tense of the verb.

Also it appears that where a section of the Revenue Act of 1928 was intended to have retroactive effect that intention was not only plainly expressed in the body of such section but was also mentioned in the heading of the section. For example, the heading of Section 704 reads "Taxability of Trusts as Corporations—Retroactive"; of Section 705, "Installment Sales—Retroactive"; of Section 706, "Contributions to Charity—Retroactive." The word "retroactive" does not appear in the headings of either Section 611 or Section 607 and there are no words in either of those sections indicating that they were to have a retroactive effect.

While it would seem clear beyond any reasonable doubt that Sections 611 and 607 refer only to claims for refund filed after their enactment, if there were doubt about the matter that doubt should be resolved in accordance with the rule applicable to all statutes, and applicable *a fortiori* to

taxing statutes—that they should, if possible, be given a prospective effect.

In *United States Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 314, a case involving the question whether a right to bring suit had been taken away by an Act of Congress, this court said:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. *Dash* v. *Van Kleeck*, 7 Johns. 499; *Jackson* v. *Van Zandt*, 12 Johns. 168; *United States* v. *Heth*, 3 Cranch 399, 414; *Southwestern Coal Co.* v. *McBride*, 185 U. S. 499, 503; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577."

In *Schwab* v. *Doyle*, 258 U. S. 529, 535, 536, in considering the Estate Tax Act, of September 8, 1916, this court said:

> "There is certainly no declaration of retroactivity 'clear, strong and imperative' which is the condition expressed in *United States* v. *Heth*, 3 Cranch 398, 413; also *United States* v. *Burr*, 159 U. S. 78, 82-83. If the absence of such determining declaration leaves to the statute a double sense it is the command of the cases that that which rejects retroactive operations must be selected."
>
> * * * * * *
>
> "But granting that the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it."

In *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, this court said:

> "Statutes are not to be given retroactive effect or construed to change the status of the claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

The rule against retroactive construction just quoted was quoted and applied by this Court in *Russell* v. *United States*, 278 U. S. 181, 188, where this Court construed Section 278 of the Revenue Act of 1924 (43 Stat. 253) and, in holding that it should not be construed retroactively to extend time for suits to collect taxes assessed prior to the enactment of that Act, said:

> "No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Section 278 or otherwise."

We respectfully submit that there is no language in Sections 611 and 607 of the Revenue Act of 1928 so "clear, strong and imperative" as to require that those sections be given a retroactive effect.

V.

The tax liability, if any, of the petitioners was extinguished by the expiration of the period within which collection of the tax was authorized by the Revenue Act of 1921. Section 611 of the Revenue Act of 1928 if construed to revive that liability violates the Fifth Amendment to the Constitution.

As we have pointed out above under Point I of this brief the additional tax here involved for the year 1917 was collected in November and December, 1924. The petitioners' return of income for the year 1917 was filed March 22, 1918, and the liability to pay any tax on income for the year 1917 expired on March 22, 1923, by the provisions of the Revenue Act of 1921 then in force.

Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265) reads in part as follows:

> "The amount of income, excess-profits, or war-profits taxes due under * * * prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection; and no suit or proceeding for the collection of any such taxes due under this Act, or under prior income, excess-profits or war-profits tax Acts * * * shall be begun after the expiration of five years after the date when such return was filed."

The above section was construed by this Court in *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, and was considered by the court in *Russell* v. *United States*, 278 U. S. 181, in which it was held that the period of limitation upon collection fixed by the 1921 Act was not extended by the Revenue Act of 1924 (43 Stat. 299) where assessment was made, as in this case, prior to the enactment of the 1924 Act.

If by operation of Section 250 (d) of the Revenue Act of 1921 the liability to pay the additional tax ceased to exist on March 23, 1923, then the taxpayers in this case had a vested right to recover the property which was taken from them by the collector in November and December, 1924 to satisfy a non-existent liability, which right could not be divested by giving retroactive effect to Section 611 of the Revenue Act of 1928.

In *William Danzer & Co.* v. *Gulf Railroad Co.*, 268 U. S. 633, this court held that the two-year limitation fixed by the Interstate Commerce Act upon the filing of claims for reparation under that Act was a limitation upon the liability of the carrier and that a subsequent Act providing that the period of federal control should not be computed as part of the limitation period would not be construed re-

troactively to recreate a liability destroyed by lapse of the two-year period, because so construed it would deprive the carrier of its property without due process of law in violation of the Fifth Amendment to the Constitution. In that case this court said, p. 635:

"Plainiff's cause of action was created and limited by the Interstate Commerce Act * * *."

Page 637:

"* * * That case (*Campbell* v. *Holt*, 115 U. S. 620) belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. **But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability.** Such, for example, are statutory causes of action for death by wrongful act; *The Harrisburg*, 119 U. S. 199, 214; and those arising under the Federal Employers' Liability Act, c. 149, 35 Stat. 65. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 511; *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199, 201; *Kannellos* v. *Great Northern Ry. Co.*, 151 Minn. 157, 160; *Jones* v. *D. L. & W. R. R. Co.*, 96 N. J. L. 197. See also *Davis* v. *Mills*, 194 U. S. 451, 454. **This case belongs to the latter class. Section 206 (f) will not be construed retroactively to create liability. To give it that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment.** Cf. *Levy* v. *Wardell*, 258 U. S. 338, 340; *Union Pacific R. R.* v. *Laramie Stock Yards*, 231 U. S. 190, 200; *Winfree* v. *Northern Pacific Ry. Co.*, 227 U. S. 296, 301." (Emphasis ours.)

In *Davis* v. *Mills*, 194 U. S. 451, 454, this court said:

"* * * It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex jori*, as affecting the remedy only and not the right. *But in cases where it has been possible to escape from that qualification by a reasonable*

distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."* (Emphasis ours.)

A provision such as that in Section 250 (d) of the Revenue Act of 1921 limiting the period within which taxes may be collected is not a statute of limitations at all in the sense in which that expression is applied to general statutes prescribing the time within which the remedy must be pursued to enforce various rights of action. For want of a better terminology the words are loosely but generally used in common practice to express two ideas which are fundamentally and radically different. Where an act refers to the statute of limitations, as do Section 607 and 611 of the Revenue Act of 1928, it is necessary to examine such limitation statute in all its relations to determine whether it operates to extinguish a liability or to suspend a remedy. Section 607 in its reference to the statute of limitations can refer only to the limitations upon the collection of taxes provided in the various Revenue Acts.

The fact that a taxpayer can recover taxes paid by him after the expiration of the statutory period of limitation upon their collection in itself shows that the limitation here involved is not merely a matter of defense to a suit which may be pleaded or waived but is a condition of the liability itself.

By every test by which a limitation statute is construed as extinguishing the liability, Section 250 (d) of the Revenue Act of 1921 must be held to have that effect. Any authority to collect taxes is purely statutory. Tax liability exists solely by virtue of a statute, one of a class of statutes, moreover, in which any doubt as to whether liability has been created will be resolved against the existence of the liability. *United States* v. *Isham*, 17 Wall. 496, 504. The limitation in question is an integral part of the series of closely related and interwoven Revenue Acts by which the liability was created and the manner of its enforcement provided for.

In various decisions of the Federal courts construing Section 250 (d) of the Revenue Act of 1921 it has been held that the limitation upon collection therein provided was a limitation upon the liability and not merely a limitation of the remedy. It was so held in *Bashara* v. *Hopkins*, 290 Fed. 592 (N. D. Texas), affirmed 295 Fed. 319, (Certiorari denied by this Court, 265 U. S. 584). In *Citizens Bank of La Fourche* v. *Miller-Link Lumber Co.*, 16 Fed. (2d) 163, 164, the same court said of said Section 250 (d) of the Revenue Act of 1921:

> "The law that creates the right to collect the taxes, by its terms, provides that no suit or proceeding for the collection of them shall be begun after the expiration of five years after the date when the return was filed. The claim becomes to all intents and purposes extinguished after that time."

In *United States* v. *John Barth Co.*, 27 Fed. (2d) 782, 784, the Circuit Court of Appeals of the 7th Circuit said in a case where collection of a tax was barred by Section 250 (d) of the Revenue Act of 1921:

> "In general, it may be said that statutes of limitation bar only remedy. But the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes cul-

minating the Act of 1926 indicate an intent not merely to bar the remedy but to extinguish entirely all liability for the tax where its determination and assessment is not made within five years after filing the return."

The decision of the Circuit Court of Appeals in *United States* v. *John Barth Company* was reversed by this court in 279 U. S. 370, upon other grounds.

Language in the opinion of this court in *Russell* v. *United States*, 278 U. S. 181, 187, indicates that the provisions in the Revenue Acts limiting the time within which taxes may be collected affect the liability of the taxpayer and not merely the remedy of the Collector. In that case this court said:

> "Manifestly, but for Sec. 278 petitioners would be *free from liability under the five year limitation in the Act of 1918,* continued by the Act of 1921. If Sec. 278 refers only to assessments made after June 2, 1924, petitioners are not liable.
>
> If an assessment made before that date came within the ambit of Sec. 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years *a liability which had almost expired* * * *." (Emphasis ours.)

In certain of the decisions of the Federal Courts construing Sections 611 and 607 of the Revenue Act of 1928, as barring the taxpayers' recovery in such a suit as this one, the cases of *United States* v. *Heinszen*, 206 U. S. 370 and *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226 have been cited. In those cases it was held that an unauthorized collection of taxes could be ratified by Congress. Those cases are not in point here because in both of them there was involved an act of Congress expressly "legalizing and ratifying" the unauthorized collection. Section 611 does not expressly ratify any collection of taxes. In neither of the two cases mentioned had the liability to pay the taxes there involved

been extinguished by operation of a statute prior to the enactment of the ratifying act. The tax here involved had been so extinguished prior to the enactment of Section 611 of the Revenue Act of 1928.

CONCLUSION.

We respectfully submit that Section 611 of the Revenue Act of 1928 does not apply to lawsuits; that it was erroneously applied by the Circuit Court of Appeals to the present case by the adoption of a strained and unreasonable interpretation of the language used in that section, giving to the section an operation that is arbitrary and unreasonably discriminatory; that Section 611 need not be and should not be construed to have a retroactive effect; that it can not be construed as reviving tax liability of petitioners, which had been extinguished by the Revenue Act of 1921, without depriving petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution; and that for each and all of these reasons the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX.

Revised Statutes, Section 3220:

"Except as otherwise provided in Sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to the regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section. (R. S. Sec. 3220; Feb. 24, 1919, c. 18, Sec. 1316(a), 40 Stat 1145; Nov. 23, 1921, c. 136, Sec. 1315, 42 Stat. 314; June 2, 1924, 4:01 p. m., c. 234, Sec. 1011, 43 Stat. 342; Feb. 26, 1926, c. 27, Sec. 1111, 44 Stat. 115. * * *)"

Revised Statutes, Section 3226:

"Suits for recovery of taxes wrongfully collected. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the

Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail. (R. S. Sec. 3226; Feb. 27, 1877, c. 69, Sec. 1, 19 Stat. 248; Nov. 23, 1921, c. 136, Sec. 1318, 42 Stat. 315; Mar. 4, 1923, c. 276, Sec. 2, 42 Stat. 1505; June 2, 1924, 4:01 p. m., c. 234, Sec. 1014 (a), 43 Stat. 343; Feb. 26, 1926, c. 27, Sec. 1113 (a), 44 Stat. 116.)"

Revenue Act of 1928, Section 273. Jeopardy Assessments:

"(f) Bond to stay collection.—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in section 297.

(g) Same—Further conditions.—If the bond is given before the taxpayer has filed his petition with the Board under section 272(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such subsection, then the amount the collection of which is stayed by the bond will be

paid on notice and demand at any time after the expiration of such period, together with interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subsection.

(h) Waiver of stay.—Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced."